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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 507

California Department of Human Resources Development; Gilbert Sheffield as Director of the California Department of Human Resources Development, et al.,

Appellants,

vs.

Judith Java, et al.,

Appellees.

Appeal from Decision of the United States District Court for the Northern District of California

BRIEF ON MERITS OF THE STATE OF OHIO AS AMICUS CURIAE IN SUPPORT OF THE STATE OF CALIFORNIA

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I

Introduction and Interest of Amicus Curiae

This brief is presented on behalf of the State of Ohio, Bureau of Employment Services, which administers an unemployment insurance program through its federally approved Unemployment Compensation Law, Sections 4141.01 through 4141.46, inclusive, of the Ohio Revised Code.

The decision of the lower Federal Court if upheld would adversely and severely affect the administration of the unemployment compensation within the State of Ohio.

Presentation of this brief is authorized and filed pursuant to Rule 42(1) of the Revised Rules of the Supreme Court of the United States.

II

Statement

Appellees are citizens of the State of California who were initially declared eligible for unemployment benefits in the State of California. Their employers subsequently appealed their determinations of eligibility pursuant to California Law, and benefits were thereafter withheld pending a decision in their employer's appeal. A three (3) Judge District Federal Court in the Northern District of California granted a preliminary injunction finding that Section 1335 of the California Unemployment Insurance Code, was lacking in both constitutional and statutory areas, because it did not allow for an adversary proceeding prior to the termination of unemployment benefits.

The District Federal Court further ruled that the California statute did not provide or insure for full payment of benefits when due and was, therefore, not consistent with or in compliance with Section 503(a)(1) of Title 42, U.S.C. of the Social Security Act of 1935, as amended; and the due process ruling as set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970).

III

Questions Presented

The questions presented in the instant case are as follows.

1. When a claimant, initially declared eligible for un-

employment benefits has an appeal filed against her by her last employer on the determination of eligibility, does the process of staying payment of further benefits until a decision is reached in the employer's appeal deprive the claimant of due process?

2. After a claimant initially declared eligible for unemployment benefits, has an appeal filed against her by her last employer in regard to the determination of eligibility, in 42 U.C.S., Section 503(a)(1), in which a state's procedure must insure full payment of benefits "when due", satisfied by the process of allowing payments to be made only after a final determination of an employer's appeal?

3. Can a federal district court rule a state statute unconstitutional, and totally invalid when the constitutionality of a state statute can be presumably constitutional and valid in a certain given fact situation?

IV

Summary of the Argument

Under Ohio Law, Section 4141.28 (G), Ohio Revised Code, after a claimant has been determined eligible by the Administrator or one of his deputies, an employer may file within ten (10) days an appeal of the determination of eligibility. This must be in writing for a reconsideration to be rendered by the Administrator. During the period in which the determination is being reconsidered, payment of future benefits affected by such appeal are withheld pending the decision upon reconsideration. If the request for reconsideration is filed within the ten-day period, the Administrator must promptly reconsider such request and issue his decision to all interested parties.

If an employer loses his request for reconsideration, he may then appeal such decision on reconsideration to the Board of Review within ten (10) calendar days after

notification. Payment of benefits in dispute are again withheld pending the decision on appeal to the Board of Review. If the claimant wins at the Board of Review level, payments shall forthwith be commenced. If a claimant loses, payments are not allowed or paid, and the employer's account will not be charged.

The Federal District Court below has ruled that this process of withholding benefit payments while an appeal has been filed and is being decided violates the due process clause of the United States Constitution.

The Federal District Court below also ruled that this process of withholding benefit payments during appeal did not comply with the prerequisites in 42 U.S.C. Section 503(a)(1) permitting federal involvement only when the state involvement insures full payment of benefits "when due".

The Ohio Law, Section 4141.28 (B) (1), Ohio Revised Code, provides that when an unemployed individual files an application for determination of benefit rights, his last prior employer shall be immediately notified, and must file with the Bureau of Employment Services within ten (10) days from the date of such notice, the reason for separation, wage and other necessary information that may be considered in determining the applicant's rights to benefits. If an employer fails to deliver such information to the Administrator within the ten (10) day period, then if necessary to insure prompt payment of benefits "when due", the Administrator may make his initial determination, and may base such determination on that information as is available to him which can include the applicant's own statements. Such determination as it relates to a claimant's determination of benefit rights can be amended within one year, or upon subsequent correct wage and other necessary information received from the employer.

The Federal District Court below also found that a delay of several weeks in the instant case violated due process and thereby violated the Californa Statute in its entirety. In Ohio the basic concept of preserving the constitutionality of a statute is of the utmost importance.

In making its ruling the Federal District Court below also found that the instant case must follow the controlling elements of *Goldberg v. Kelly*, 397 U.S. 254 (1970). It is the State of Ohio's basic contention that the *Goldberg v. Kelly* case is definitely distinguishable for various reasons.

Since the Ohio statutory laws pertaining to the questions presented by this appeal are similar to those of California, it is the State of Ohio's desire to see that the Federal District Court's rulings are reversed upon the basis of a complicated and harsh interpretation of the law, which will adversely affect the administration of the Ohio Unemployment Compensation Program.

The basis of the State of Ohio's arguments are first that there was no denial of due process in suspending payments of benefits while there is an appeal filed by an employer against a claimant initially determined to have been eligible for benefits, on the basis that employer's rights are equal to, if not superior to claimant's rights since the employer normally foots the bill through taxation for any unemployment benefits paid. Secondly, that insuring payments of benefits "when due" pursuant to 42 U.S.C. Section 503(a)(1) means that payments of benefits are "due" only when a final determination has been rendered that a claimant is actually eligible for said payment of benefits, and not when a claimant initially makes application for benefits. Thirdly, federal courts should uphold the constitutionality of a state statute whenever possible within a certain fact situation.

V

Argument

1. A Claimant Declared Initially Eligible for Unemployment Benefits, and Who Has an Appeal Filed by His Last Employer on the Determination of Eligibility, and Where Payment of Benefits is Stayed Until the Appeal Has Reached a Finality, is Not Deprived of Procedural Due Process of Law.

The due process clause reads: "nor . . . deprive any person of life, liberty or property without due process of law."

In *Joint Anti-Fascist Refugee Committee v. McGrath*, U.S. Const. Amend. V & XIV, Sec. 1, 341 U.S. 123 (1951) (3) Justice Frankfruter said:

> "Whether the . . . procedure . . . observed 'the rudiments of fair play . . .' cannot be tested by mere generalities or sentiments abstractly appealing. The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment."

Perhaps an analysis of due process and its relevance to unemployment compensation can best be seen in previous judicial interpretation of its applicability to non-unemployment compensation cases.

Consider the circumstances of summary administrative action without the safeguards of adequate due process protection in numerous instances. In *North American Cold Storage Company v. City of Chicago*, 211 US 306 (1908)), official confiscated from the plaintiff's warehouse a vast supply of poultry alleging that it was infected or decayed food; however, before the plaintiff was

informed of said action, the poultry was destroyed. The Court upheld the action of the city officials when it stated:

> "Provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for use *is not necessary*. The right to so seize is based upon the right and duty of the state to protect and guard, as far as possible, the lives and health of its inhabitants." (See also Davis, Administrative Law Tex Sec. 7.08 at P. 123 (1959).

In *Bowles v. Wellingham,* 321 U.S. 503 (1944), and *Yakus v. United States,* 321 U.S. 4141 (1944) legality of a portion of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C. Sections 901-46 (1964) was questioned. The Government was given the power to set maximum rents and prices without giving any affected individual a prior hearing. The Court in approving this procedure stated:

> "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate . . . delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied."

Currently, many courts are swamped with litigation concerning the question of whether due process requires that a welfare recipient be given the opportunity for a hearing prior to discontinuation of relief payments.

The most recent analysis of this problem appears in *Goldberg v. Kelly* where Justice Brennan, writing for the five man majority declares that procedural due process under the Fourteenth Amendment requires that welfare recipients be afforded an evidentiary hearing before termination of benefits by welfare authorities. Perhaps a short synopsis of the factual setting will make an examination of the case more meaningful.

This action was brought by residents of New York City receiving financial aid under AFDC (Aid to Families with Dependent Children) or under the Home Relief Program. They alleged that the officials who were administering these programs terminated them without prior notice. The City of New York elected to institute a local procedure providing the giving of notice to the recipient of the reasons for a proposed discontinuance or suspension at least seven days prior to its effective date and also that said recipient may have the proposal of termination reviewed by a supervisor or the official who approved the termination or suspension. During this review the recipient may submit written statements. This decision must be made expeditiously to the recipient. The challenge to this procedure comes over the absence of any stipulation for personal appearance by the recipient before the reviewing official or confrontation and cross examination of the adverse witnesses. Although a post termination fair hearing is provided with all the due process safeguards, it is the interim where payments are terminated before this post termination fair hearing, that appellees allege severe hampering of their rights.

However, Justice Brennan *distinguishes welfare recipients from any one else benefiting from a government largess* when he states:

> "Thus the crucial factor in this context—a factor not present in the case of the black listed government contractor, the discharged government employee, the taxpayer denied a tax exemption or virtually anyone else *whose governmental largess is ended*—is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits."

Unlike the welfare recipient, the unemployed worker is not by definition cast into dire poverty but often has

sufficient resources to sustain himself until his appeal of the termination or suspension of benefits can be perfected.

Another argument raised by the state government in *Goldberg* when arguing on behalf of the state's interest to preserve its public fund and again reiterated in *Java* was the contervailing governmental interest in conserving fiscal and administrative resources. These interests justify the delay of any evidentiary hearing until after discontinuance of the grants. Summary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible. Since most terminations are accepted *without challenge*, summary adjudication also conserves both administrative time and energy by reducing the number of evidentiary hearings actually held.

Justice Black in his dissent in *Goldberg* outlined a harsh repercussion of this decision when he assessed the possibility of the state agency being slower to place a needy individual on relief:

"This, the end result of today's decision may well be that the Government, once it decides to give welfare benefits, cannot reverse that decision until the recipient has had the benefits of full administrative and judicial review, including of course, the opportunity to present his case to this Court. Since the process will usually ental a delay of several years, the inevitable result of such a constitutionally imposed burden will be that the Government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without a full 'due process' proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility."

Another attack at the majority opinion leveled by Justice Black was that this newly required procedure has no precedent in our legal system. He went on to state:

> "Reduced to its simplest terms, the problem in this case is similar to that frequently encountered when two parties have an ongoing legal relationship which requires one party to make periodic payments to the other. Often the situation arises where the party 'owing' the money stops paying it and justifies his conduct by arguing that the recipient is not legally entitled to payment. But I know of no situation in our legal system in which the person alleged to owe money to another is required by law to continue making payments to a judgment-proof claimant without the benefit of any security or bond to insure that these payments can be recovered if he wins his legal argument . . . These recipients are by definition too poor to post a bond or to repay the benefits which, as the majority assumes, must be spent as received to insure survival."

Consequently, one can see that even in the welfare area, where due process has been making successful inroads, its application still leaves some rough spots that need additional attention before it can turn to unemployment compensation.

Appellees argue that no one may be deprived of property by state action unless first given notice and an opportunity to be heard. They then argue that they are entitled to receive unemployment compensation benefits even though their right to such benefits is being contested by the employer, the party who is ultimately paying for such benefits. What the appellees fail to realize is that an employee does not have an inherent right to receive unemployment compensation, unless he is eligible thereto in all respects under the statute. The determination of eligibility is by its very nature an adversary proceeding if the employer contests such eligi-

bility. The final determination of eligibility is not made until the administrative procedure has been exhausted. It is only when that final determination of eligibility has been made that the *right* vests in the employee. He then receives benefits for the entire period in which he was eligible to receive them, both retroactively and prospectively. To hold that the employee is vested with the right to benefits upon the initial determination of eligibility in a local office, which initial determination is made on the basis of *ex parte* statements by the employee and the employer, would in effect deprive the employers of property while denying them due process of law. The employer, no less than the claimant, has a right to due process of law. See *District Unemployment Compensation Board v. Wm. Hahn & Co., Inc.*, 399 F2d 987 (D.C. Cir. 1968).

A close reading of *Goldberg v. Kelly* reveals the Court's repeated references to the "uniqueness" of the determination of welfare benefits and the overpowering social consideration in providing prompt payment of benefits to persons who are destitute, without funds or assets of any description. The Court found the need of the poor to be of greater significance than the relatively small cost to the *general public* occurring from the erroneous determination of benefits. However, it is significant that the Court notes, at 25 L. Ed. 2d 296, that:

> "It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing."

Your amicus curiae submits that the Court was acknowledging the constitutionality of procedures such as those in the present case. See *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 wherein the Supreme Court stated that the existence of "constitutional re-

straints" on dealing with public employees (*United Public Workers v. Mitchell*, 330 U.S. 75 (1947)) did not require *notice of any hearing* for an employee before terminating his employment. 376 U.S. at 898.

Unlike the situation in *Goldberg v. Kelly*, the court in this case must balance the right of a small class of eligible employees against the rights of a small class of amenable employers. Public funds created by tax dollars from the general public are not being depleted, such as in welfare; but instead a special fund created by premiums from a special class would be affected by plaintiff's proposal. Millions of dollars would be paid by this special class to a relatively small number of employees, many of whom may not even be entitled to benefits. Unlike welfare recipients most employees seeking unemployment compensation are not destitute or without funds. Included in their number would be a myriad of seasonal workers, high salaried laborers, engineers, teachers, wives of working husbands, and other persons who have either savings or supplemental earnings. As pointed out before in this brief, benefits are paid only to those persons who have been employed for a certain period of time and who become unemployed through no fault of their own.

Due process is not a concept which demands that this Court invalidate carefully conceived administrative procedures which require reasonable time intervals for the determination of eligibility. The requirements of due process necessarily vary with the type of proceeding involved, *Hannah v. Larche*, 363 U.S. 420, 440, and cannot be equated with inflexible procedures universally applicable to every imaginable situation. *Cafeteria Workers' Local 473 v. McElroy*, 367 U.S. 886, 895. In each case the nature of the alleged right, the nature of the proceedings, and the possible burden on that pro-

ceeding, are all relevant considerations. *Hannah v. Larche, op. cit.* at 442.

In this case the interest of the relatively small number of employees whose initial determination of eligibility is appealed is more than offset by the interest of others. The State of Ohio is interested in maintaining an unemployment compensation system under which the greatest number of unemployed persons can begin to receive benefits immediately upon request without the delay and expense occasioned by the necessity of a true adversary hearing. Further, the State is interested in seeing that benefits are not paid to any person who is not entitled to them. The interests of Ohio employers coincide with those of the State on the two aforementioned points, and in addition the employers are interested in keeping their contributions to the Ohio Unemployment Compensation Fund as low as possible when they have a record of no or few layoffs. Under the plan suggested by plaintiff an employer's contributions to the fund would be increased irrespective of his highly successful and desirable full employment record.

2. When a Claimant is Initially Declared Eligible for Unemployment Benefits, Has an Appeal Filed Against Her by Her Last Employer in Regard to the Determination of Eligibility, the Process of Allowing Payment of the Benefits to be Made Only After a Final Determination of the Employer's Appeal is in Compliance With and Satisfies 42 U.S.C. Section 503(a)(1) Which Calls for a State's Procedure to Insure Full Payment of Benefits "When Due".

The Ohio unemployment compensation purpose is in compliance with the Federal Social Security Act as to insuring payments of benefits "when due".

State unemployment insurance is authorized and controlled by the Federal Unemployment Compensation Act which is included in the Social Security Act of 1935. Section 503(a)(1) of the Act provides in part:

> "(a) The Secretary of Labor shall make no certification for payment (of federal funds for administration of state unemployment statutes) to any state unless he finds that the law of such state, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—"(1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due."

There are three essential purposes which underlie the Federal Act: to stabilize consumer demand and business in the crucial incipient stages of economic depression; to provide compensation for a short period of time while the unemployed worker seeks reemployment; and to prevent the worker from having to resort to public assistance such as welfare. See *S. Rep.* No. 628, 74th Cong. 1st Sess. 10-13 (1935)); *H.R. Rep.* No. 615, 74th Cong.; 1st Sess. 7-9 (1935).

Keeping the above introductory notes in mind, the author will, in the remainder of this brief, survey the much litigated field of welfare, evaluate relevant decisions and present the Court with some comparisons when considering the applicability of a fair hearing before unemployment compensation benefits are suspended.

One might argue that this action is also unconstitutional under the equal protection clause of the Fourteenth Amendment. Both employers and employees are entitled to appeal the Departmental eligibility determinations if they are not satisfied. Section 4141.28 (G), Ohio Revised Code.

A more sensible interpretation is that payments are "due" only when both sides have had an opportunity to be heard. At the initial interview generally only the claimant is present; he presents his version of the facts and may bring witnesses and documents to support his claim. The employer, often preoccupied with business and having no prior notice of the interview, does not appear. He is usually contacted and must supply within ten (10) days wage and other necessary information. Section 4141.28 (B) (1), Ohio Revised Code. Following the determination, the employer is informed of the decision and may then appeal. Until this time only the claimant has had a more advantageous opportunity to present his case; the employer has not, as a practical matter the employer has not had an opportunity to exercise his right to be heard. To carry this analysis one step further, continuing payments during the pendency of an employer's appeal would prematurely deprive the employer of his property before a finality in his right to be heard, since generally such payments are unrecoverable by the state or the employer. Consequently, this can amount to an adjudication, before the employer has had a meaningful chance to present his case. To force payments during an appeal would substantially dilute the employer's right to be heard. *Babb v. Bullitt*, 310 Ky. 211, 220 SW 2, 394 (1949). An application for benefits involves not only the claimant, the state, but those private employers who fund the unemployment compensation program. The money to pay benefits does not come from general tax revenues but from an identifiable segment of the population (employers) who are required to make contributions into an unemployment fund to pay benefits. The State does not have the direct interest as it has in a welfare situation, where every dollar the states save may be available for other programs which

also may compete for Federal funds. With unemployment compensation, the State is basically neutral since it cannot use the unemployment compensation fund for any other state purpose but must simply insure that sufficient money is available in the fund to pay all unemployment claims. Consequently, the state may be looked upon as a fiduciary in administrating the unemployment compensation fund. The real parties in interest are the private employers who may be required to pay more into the fund if the *Goldberg* ruling is applied in the area of unemployment compensation.

Therefore, it seems that payments are "due" only when a final determination setting forth eligibility would have been reached. When such a determination or ruling has become final, then the benefits could be said to be "owing" to an eligible claimant. *Peoples v. Buckles*, 57 Cal. App. 2d 76, 79 (1943); *Fesser v. Fesser*, 93 Md. 716, 50A 406 (1901); Cf. *Joyce v. Scott*, 265 F. 2d 369, 371-372 (1959); *In re Ingersoll Co.*, 148 F. 2d 282, 284, (1945).

If there is an appeal at the first level by an employer, after a claimant has been initially determined to be eligible for benefits, this appeal should be enough to overcome the initial determination and to allow benefits to be stayed until a decision is rendered on the appeal. If the initial determination is reaffirmed after a subsequent appeal to the Board of Review, as would be the case in Ohio from a decision on reconsideration by the Administrator, then is this to be construed as sufficient cause for starting and continuing payments, notwithstanding the fact that further appeals may take place? This appellant thinks not. At this point, we cannot be sure that the Constitution forces payments to be made even at this point or level of appeal. *Pennsylvania Chamber of Commerce v. Torquato*, 386 Pa. 306, 125 A. 2d 755, 767

(1956); Cert. Denied, 352 U.S. 1024; *Chrysler Corp. v. Appeal Board of Michigan Unemployment Comp. Commission*, 301 Mich. 351, 3 NW 2d 302 (1942); *State ex rel. Campbell v. State*, 223 Ind. App. 59, 75 N.E. (2d) 433, (1944); *Dallas Fuel v. Horne*, 230 Iowa 1148, 300 NW 303 (1941).

In effect, the most that appellees could establish is that after the initial determination favorable to them they have what might be termed an inchoate right. The right will become vested, so to speak, if the employer does not file an appeal or, in the event of such an appeal, the Referee affirms the initial determination.

This timing represents a considered effort by the Ohio General Assembly to minimize the possibility of improvident payment. The initial procedure for determining whether a claimant is eligible for benefits does not amount to a full scale investigation nor does it remotely resemble a hearing at which the employer may fully air his views. At this preliminary stage no testimony is taken under oath, there is no right to confrontation, right to call witnesses, etc. For this reason the Ohio Legislature has decreed that the initial determination that a claimant is entitled to benefits is not sufficient, standing alone, to justify immediate payment of those benefits. For that matter, a decision of a referee reversing an initial denial of benefits is treated in similar fashion, i.e., standing alone, a referee's decision awarding benefits following an initial denial is not deemed sufficient to justify an immediate payment of benefits. However, in the judgment of the Ohio General Assembly the risk of unwarranted and improper benefit payments is so reduced by the agreement of the Board of Review and the referee that a claimant is eligible, that upon such concurrence benefits may reasonably be considered "due". Hence, at that point benefits commence immediately,

despite the possibility that a later court decision may eventually result in a ruling that the claimant is in fact ineligible.

The administrative procedures followed with respect to unemployment benefits in Ohio are designed to accord the swiftest possible payment to the vast majority of claimants. In developing an unemployment compensation program, the Ohio General Assembly was faced with two possible procedures. It could provide for prompt initial determinations of claims followed by prompt payment which, in the great bulk of cases would be unreviewed. In the alternative, it could provide for full-scale hearings before benefits were either allowed or denied and thereby delay all payments. On balance, it seemed more sensible, and more just, to make a rapid determination on the available evidence with the safety valve of redetermination and/or appeal. The adoption of the first alternative was designed to help claimants, not to hurt them. Indeed, it is greatly to be doubted that many members of the class which appellees claim to represent would support them in this delay and it is ironic that appellees obviously would find no objection to the slower, more cumbersome method of pre-determination hearings. Certainly they do not claim that a hearing is required before a person can be declared ineligible for benefits if he has never been paid.

Parenthetically, we might note that the determination concerning when payments from the state are "due" is one properly to be made by the Secretary of Labor and appellees' argument in this regard should be directed at him. The Secretary of Labor has certified the Ohio plan and, to your amicus curiae's knowledge, the plans of 48 other states which have provisions similar to the section being examined here. Implicit in his certification is a finding by him that benefits are in fact paid by the state "when due". The Secretary is presumed to have

acted correctly. Appellees' arguments that payments are not being made "when due" are supported neither by the administrative findings of the Secretary of Labor nor by the commonly accepted legal meaning of the subject term.

Appellees' contention is that California is not in conformity with the requirements of Section 503 (a) (3) of the Social Security Act, which provides that the Secretary shall make no certification unless he finds that the state provides for "(3) Opportunity for a fair hearing, before an impartial tribunal for all individuals whose claims for unemployment compensation are denied." The argument is that staying benefits pending an appeal violates this provision. The argument has no merit.

First, the claims for benefits in the instant case have both been *granted*, not denied. Note that the language of the Federal Statute refers to "claims" which have been denied. It does not refer to a policy of withholding benefits after a claim has been granted. It would make absolutely no sense to believe that Congress intended that a state must provide a full scale hearing upon an applicant's first application for benefits. It is inconceivable that Congress would have intended that the State of Ohio should provide a full scale hearing in the thousands of unemployment insurance claims which were filed in this state.

The sensible interpretation of Section 503(a)(3) of the Social Security Act is that portion which requires an opportunity for a fair hearing for individuals whose claims are "denied" should be construed as meaning "are *finally* denied." This means that a claimant who applies for unemployment insurance benefits will receive initially an administrative determination concerning his eligibility. If his claim is denied, he then has an opportunity to appeal and the denial is not considered final until he has had an opportunity for a fair hearing before a ref-

eree. On the other hand, if the claim is initially granted at the administrative level, the employer is given the right to appeal that determination because he is the one whose money pays the claimant's benefits.

3. A Federal Court Should Save and Preserve the Constitutionality of a Statute Wherever Possible.

In our court system today, it seems that there is a strong presumption in favor of upholding the validity of a statute's constitutionality whenever possible under any given fact situation. This presumption stems from the basic philosophy and principal of statutory construction in that a statute should be saved whenever possible and not destroyed. *Labor Board v. Jones and Laughlin*, 301 U.S. 1, 30 (1937); *United States v. Menasche*, 348 U.S. 528, 538 (1955); *Epstein v. Helvering*, 120 F. 2d 427 (1941).

The United States Supreme Court has set forth the principal, stating:

> "It is within the power and is the duty of this Court to construe a statute so as to avoid the danger of unconstitutionality if it may be done in consonance with the legislative purpose." *Communications Association v. Donds;* 339 U.S. 382, 407 (1950); See also *Antilles Surveys Inc. v. DeJongh*, 358 F. 2d 787; Cert. denied, 385 U.S. 900 (1966)

The delay in our instant case, a delay of only several weeks, is not so unreasonable as was the delay in the *Goldberg* case, a delay of nearly four (4) months. The Court should take into consideration the huge proportion of cases and claims handled by the average State Unemployment Agency. The Federal Court below could have saved the constitutionality of the state statute involved by taking the fact situation into consideration, and perhaps could have given the unemployment department or agency a guideline to follow in processing claims so as not to delay them any longer than necessary.

VI

Conclusion

For all the foregoing reasons, it is respectfully submitted that this Honorable United States Supreme Court should reverse the decision of the Federal District Court below.

Dated: December 9, 1970

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Certification

A copy of this Brief on Merits of the State of Ohio as Amicus Curiae in Support of the State of California Department of Human Resources Development, et al., in the subject case now pending in the United States Supreme Court, has been forwarded by Air Mail Special Delivery to Mr. James M. Klein, Attorney-at-Law, Contra Costra Legal Services Foundation, 431 Sixth Street, Richmond, California 94801, Attorney for Appellees, and to Mr. Asher Rubin, Deputy Attorney General, Department of Justice, State Building, San Francisco, California 94102, Attorney for Appellants, this 9th day of December, 1970.

FRANKLIN R. WRIGHT
Assistant Attorney General

ND CLOSE IN CENTER